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No. 00-1332

In the Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., ET AL., PETITIONERS

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

The Brady Handgun Violence Prevention Act (Brady Act), Pub. L. No. 103-159, 107 Stat. 1536 (1993), requires the Attorney General to establish a "national instant criminal background check system" (NICS) that federally licensed firearms dealers can contact for information on whether receipt of firearms by prospective transferees would violate 18 U.S.C. 922 or state law. A regulation promulgated by the Attorney General, 28 C.F.R. 25.9(b), provides for the maintenance of an audit log of all incoming and outgoing transactions that pass through the NICS, and for the destruction of that log after no more than six months. The questions presented are:

1. Whether the retention of the NICS audit log concerning allowed firearms transfers for no more than six months is prohibited by Section 103(i) of the Brady Act, 107 Stat. 1542.

2. Whether retaining information concerning allowed firearms transfers in the NICS audit log for a period not to exceed six months is prohibited by 18 U.S.C. 922(t)(2).

3. Whether the court of appeals properly reviewed the Attorney General's regulations interpreting the Brady Act under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 216 F.3d 122. The memoranda and order of the district court (Pet. App. 49a-53a, 54a-55a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 43a-44a) was entered on July 11, 2000. The court of appeals denied petitions for rehearing on October 26, 2000 (Pet. App. 45a-46a, 47a-48a). On January 17, 2001, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 23, 2001. The petition for a writ of certiorari was filed on

February 22, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (Brady Act or Act), directs the Attorney General to establish and operate a "national instant criminal background check system" (NICS) that federally licensed firearms dealers can contact, by telephone or other electronic means, for immediate information on whether the receipt of a firearm by a potential transferee would violate 18 U.S.C. 922 or state law. Brady Act § 103(b), 107 Stat. 1541; 18 U.S.C. 922(t)(1); 18 U.S.C. 922(t)(2) (1994 & Supp. V 1999). Because the information contained in the system and query outcomes—*i.e.*, the fact that an individual has something in his history such as a conviction or mental illness that would preclude him from owning a gun—raise both privacy and security issues, Congress directed the Attorney General to issue regulations "to ensure the privacy and security of the information of the [NICS]." Brady Act § 103(h), 107 Stat. 1542.

The Brady Act also restricts the federal government's use and retention of records concerning background checks where the proposed firearms transfers would not violate federal or state law. In particular, the Act provides that, if receipt of a firearm would not violate state or federal law, the system must assign a transaction number to the call, provide that number to the dealer, and "destroy all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer." 18 U.S.C. 922(t)(2) (1994 & Supp. V 1999). The Act does

not specify when the records destruction must take place. The version of the Brady bill initially passed by the House of Representatives provided that the system must "immediately destroy all records" of any transactions that are allowed to proceed. See 139 Cong. Rec. H9098, H9123, H9144 (daily ed. Nov. 10, 1993). The House, however, acceded to the Senate version of the destruction requirement, which did not contain the term "immediately." See Pet. App. 10a-11a; see also 18 U.S.C. 922(t)(2)(C).

2. Following notice and comment, the Attorney General promulgated regulations to establish and implement the NICS. See 28 C.F.R. 25.1 *et seq.* At the heart of this lawsuit is the "audit log" regulation, which requires that certain information on NICS transactions, including transfers that are allowed to proceed, be retained in an audit log for a period not to exceed six months. 28 C.F.R. 25.9(b). Information in the audit log is "used to analyze system performance, assist users in resolving operational problems, support the appeals process [concerning denials of firearms transfers], or support audits of the use of the system." 28 C.F.R. 25.9(b)(2); 66 Fed. Reg. 6470, 6474 (2001). Audit log information on allowed transfers "may be accessed directly only by the FBI for the purpose of conducting audits of the use and performance of the NICS." 66 Fed. Reg. at 6472. The Attorney General's regulations expressly prohibit the use of the audit log to establish a federal firearms registry. 28 C.F.R. 25.9(b)(1) and (2). The audit log can be retained no more than six months, after which all information on approved transactions—except the NICS transaction number and the date the transaction number was assigned—must be destroyed.

28 C.F.R. 25.9(b)(1); see 18 U.S.C. 922(t)(2) (1994 & Supp. V 1999).[1]

As the preamble to the Attorney General's regulations explains, the audit log is designed to "satisfy[] the statutory requirement of ensuring the privacy and security of the NICS and the proper operation of the system." 63 Fed. Reg. 58,303 (1998).

> By auditing the system, the FBI can identify instances in which the NICS is used for unauthorized purposes, such as running checks of people other than actual gun transferees, and protect against the invasions of privacy that would result from such misuse. Audits can also determine whether potential handgun purchasers or [Federal Firearms Licensees or FFLs] have stolen the identity of innocent and unsuspecting individuals or otherwise submitted false identification information, in order to thwart the name check system. The Audit Log will also allow the FBI to perform quality control checks on the system's operation by reviewing the accuracy of the responses given by the NICS record examiners to gun dealers.

Id. at 58,303-58,304. See also 64 Fed. Reg. 10,262, 10,263 (1999) ("Auditing * * * is essential to safeguard the security and privacy of personal information in the system. The NICS will perform background checks that access a tremendous amount of criminal history, mental health, military background, and other information about individuals. * * * Many businesses and

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[1] Where the information in the audit log is "needed to pursue cases of identified misuse of the system," the data "may be retained and used as" necessary to bring the matter to resolution. 28 C.F.R. 25.9(b)(2).

individuals would be very interested in having easy access to these government databases through FFLs to do employment or other unauthorized checks.").

During the notice and comment period, the Justice Department responded to the claim that 18 U.S.C. 922(t)(2) requires immediate destruction of all records and thus bars the government from retaining a temporary audit log. "Although [Section 922] mandates the destruction of all personally identified information in the NICS associated with approved firearms transactions (other than the identifying number and the date the number was assigned), the statute does not specify a period of time within which records of approvals must be destroyed." 63 Fed. Reg. at 58,303. The Department also rejected the claim that the audit log constituted a federal firearms registry prohibited by Section 103(i) of the Brady Act, 107 Stat. 1542. The records would be retained, the Department explained, only for a limited time and used only for the purposes of ensuring informational privacy and guaranteeing system reliability, accuracy, and integrity. 63 Fed. Reg. at 58,303.

The Attorney General also concluded that the audit log should be destroyed within six months, and that the government should "work toward reducing the retention period to the shortest practicable period of time less than six months that will allow basic security audits of the NICS." 63 Fed. Reg. at 58,304. Consistent with that goal, in January 2001, the Attorney General promulgated amendments to 28 C.F.R. 25.9(b), which would shorten the retention period to 90 days. See 66 Fed. Reg. at 6470, 6474. Those changes were originally to take effect on March 5, 2001, *id.* at 6471, and are currently scheduled to take effect on July 3,

2001, unless further modifications are made. See 66 Fed. Reg. 22,898 (2001).

3. On November 30, 1998, the date on which the audit log regulations first took effect, petitioners filed this action for declaratory and injunctive relief and a writ of mandamus against the Attorney General. Petitioners alleged, *inter alia*, that the temporary retention of an audit log containing NICS records of allowed firearms transfers was inconsistent with the Brady Act. See C.A. App. 17-19. The district court dismissed petitioners' complaint, concluding that "Congress had not spoken directly to the question at issue" and that "defendant's construction of the Brady Law was permissible." Pet. App. 55a.

The court of appeals affirmed. Pet. App. 1a-34a, 43a-44a. The court of appeals first observed that, because petitioners challenge an agency regulation, the case must be analyzed under "the familiar two-part test of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)." Pet. App. 7a. Under *Chevron* step one, the court asks "'whether Congress has directly spoken to the precise question at issue,' for if it has, 'that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Ibid.* (quoting *Chevron*, 467 U.S. at 842-843). If the statute is silent or ambiguous with respect to the specific question at issue, the court of appeals explained, it moves to *Chevron*'s second step, "asking 'whether the agency's answer is based on a permissible construction of the statute.'" *Ibid.* (quoting 467 U.S. at 843). At that point, the court "afford[s] substantial deference to the agency's interpretation of statutory language." *Ibid.*

Applying the two-step *Chevron* framework, the court of appeals rejected petitioners' challenges to the

Attorney General's regulations. Pet. App. 7a-34a. Petitioners' first claim was that 18 U.S.C. 922(t)(2) "unambiguously prohibit[s] the Attorney General from retaining information about allowed transactions for any purpose." Pet. App. 7a. Section 922(t)(2), the court agreed, does require the government to "destroy all records of the system" regarding approved transactions, except "the identifying number and the date the number was assigned." *Id.* at 8a. But the court disagreed with petitioners' claim that the statute unambiguously requires destruction to take place immediately. The word "immediately" is not in the statute, *ibid.*, and Congress had declined to adopt a version of the statute that included that term, *id.* at 10a-11a. Moreover, following the Attorney General's promulgation of the audit log regulations, Congress repeatedly declined to amend the statute or pass appropriations legislation that would insert an immediate destruction requirement into the statute. *Id.* at 11a-12a. In light of those considerations, the court concluded that Section 922(t)(2) does not require the immediate destruction of NICS transaction records.

The court of appeals also rejected petitioners' claim that the audit log is inconsistent with Section 103(i) of Brady Act, which is entitled "Prohibition Relating to Establishment of Registration Systems with Respect to Firearms." Subsection 1 of Section 103(i) bars any agency, officer, or employee of the United States from "requir[ing] that any record or portion thereof generated by the [NICS] be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or political subdivision thereof." 107 Stat. 1542. The audit log regulations, petitioners contended, violate Section 103(i)(1) because log entries constitute "record[s] * * * generated by the" NICS,

and are "recorded at" facilities "owned, managed, or controlled by the United States." The court of appeals disagreed. Section 103(i)(1)'s prohibition on requiring the "record[ing]" of a "record," the court explained, is laden with ambiguity. Pet. App. 13a-14a. As an initial matter, the prohibition could not be read as barring the generation of records in the first instance. Section 922(t)(2)(C) itself speaks of "destroy[ing] all records" relating to allowed transfers, and thus presumes that records will be generated. In addition, the court observed that the prohibition could not be read as categorically banning the government from retaining records for a brief period. Although Section 103(i) bars the government from requiring the recording of "*any*" NICS "record or portion thereof"—and provides no exceptions—other provisions of the Act specifically contemplate that the government would itself record and retain certain NICS records, including records relating to disallowed transfers, see 18 U.S.C. 922(t)(2) (1994 & Supp. V 1999); 107 Stat. 1542, and identification numbers and dates for transactions for allowed transfers, 18 U.S.C. 922(t)(2)(C). See Pet. App. 15a-16a.

In view of those considerations, the court of appeals found the Attorney General's alternative construction of the statute persuasive. Emphasizing the word "require," the Attorney General had interpreted the statute as barring the government from requiring third parties, such as firearms dealers, from recording information at a federal or state government facility. Pet. App. 16a. If Congress had intended Section 103(i) to bar the Attorney General from recording or retaining information, the court of appeals explained, it would not have barred government agencies, officers, and employees from "*requir[ing]* that any record or portion thereof generated by the [NICS] *be* recorded."

Brady Act § 103(i)(1), 107 Stat. 1542 (emphasis added). Instead, Congress would have barred government agencies, officers, and employees from "*record[ing]*" or making a "record" of the NICS transaction. Pet. App. 16a.

The court of appeals also rejected petitioners' claim that the audit log violates subsection 2 of Section 103(i), which bars government agencies and officials from "us[ing] the [NICS] to establish any system for the registration of firearms, firearm owners, or firearm transactions or dispositions, except with respect" to individuals who are barred from receiving firearms. Pet. App. 17a. The audit log, the court observed, is not a "system for the registration of firearms, firearm owners, or firearms transactions or dispositions." *Ibid.* It does not retain the names and personal information of gun purchasers indefinitely, or for purposes of tracking those individuals. Instead, it permits certain information to be retained for a limited period of time for the sole and exclusive purposes of "protecting the privacy of the NICS and for quality control." *Ibid.* (internal quotation marks omitted). The audit log, moreover, contains a maximum of six months' transactions, a snapshot that "reveals virtually nothing about the universe of firearms owners in the United States." *Ibid.* Indeed, the court of appeals continued, the audit log stands in contradistinction to other databases that constitute registration systems, like the central registry of machine guns established by the National Firearms Act. While the machine gun registry contains extensive information about the individuals with the weapons and the weapons themselves, the audit log contains little information, does not indicate if the proposed buyer completed the transaction, and is purged every six months. *Id.* at 18a.

The court of appeals also concluded that the Attorney General's audit log regulations reasonably implemented the Brady Act's requirements. Pet. App. 18a-34a. The Brady Act itself, the court observed, directed the Attorney General to issue regulations "to ensure the privacy and security of the information of the [NICS]." *Id.* at 23a (quoting Brady Act § 103(h), 107 Stat. 1542). Audits, the court agreed, serve that goal by ensuring that the system's confidential information is not used for unauthorized purposes. *Id.* at 23a-24a. The court also noted that the audit log regulations were consistent with the Act's legislative history, which evidenced Congress's concern about the invasion of privacy that could result from unauthorized use. See *id.* at 24a (quoting 139 Cong. Rec. S16,326, S16,327 (daily ed. Nov. 19, 1993) (statement of Sen. Leahy)). In addition, the court of appeals agreed that the audit log helps ensure that the system is "working" properly, *id.* at 21a, and providing "accurate" responses, *id.* at 22a. The need for an audit log, the court of appeals also noted, is supported by the fact "that auditing is not unusual for computerized systems like the NICS." *Id.* at 23a.

Judge Sentelle dissented. Pet. App. 34-42a. The Attorney General, he declared, had "not only exceeded the authority granted her under [18 U.S.C. 922(t)(2)], but ha[d] also violated express prohibitions of other statutory sections." Pet. App. 35a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review therefore is not warranted.

1. The Brady Handgun Violence Prevention Act (Brady Act or Act), Pub. L. No. 103-159, 107 Stat. 1536

(1993), requires the Attorney General to establish an effective national instant criminal background check system (NICS). The Act requires the Attorney General "to ensure the privacy and security of the information of the [NICS]," Brady Act § 103(h), 107 Stat. 1542, and specifies that the Attorney General must destroy records of allowed firearms transfers, 18 U.S.C. 922(t)(2) (1994 & Supp. V 1999). The Attorney General's audit log regulations—which require both temporary retention of certain information for a brief period and the information's complete destruction after that period—are consistent with the Brady Act.

As the preamble to the Attorney General's regulations makes clear, the audit log is designed to "satisfy[] the statutory requirement of ensuring the privacy and security of the NICS and the proper operation of the system." 63 Fed. Reg. 58,303 (1998). By auditing the system, the government "can identify instances in which the NICS is used for unauthorized purposes, such as running checks of people other than actual gun transferees, and protect against the invasions of privacy that would result from such misuse." *Ibid.* The need for such protection is particularly great given the confidential and valuable information the system provides. As the Attorney General explained:

> Auditing the users * * * of the NICS is essential to safeguard the security and privacy of personal information in the system. The NICS will perform background checks that access a tremendous amount of criminal history, mental health, military background, and other information about individuals. * * * Without the capacity to audit the use of the system, there will be no way of determining whether [Federal Firearms Licensees or

> FFLs] are requesting checks for purposes other than checking on the background of a prospective gun purchaser. Many businesses and individuals would be very interested in having easy access to these government databases through FFLs to do employment or other unauthorized checks.

64 Fed. Reg. 10,262, 10,263 (1999).

The audit log, moreover, helps ensure that information provided by the system is accurate. 63 Fed. Reg. at 58,303-58,304. Decisions to allow a firearm purchase are not fully automated, and thus require officials to review and evaluate records before making a decision. See C.A. App. 110. Review of decisions made by NICS examiners is necessary to ensure that the responsible individuals make correct decisions on whether a transfer is permissible, and to enable supervisors to provide additional training where necessary. See *id.* at 110-111; 63 Fed. Reg. at 58,303-58,304. Audits can also help determine "whether potential handgun purchasers or FFLs have stolen the identity of innocent and unsuspecting individuals or otherwise submitted false identification information, in order to thwart the name check system." 63 Fed. Reg. at 58,303-58,304. Finally, audits are vital to ensuring that the system (including its software) is working properly from a technical standpoint. See 28 C.F.R. 25.9(b)(2); C.A. App. 107-108. The FBI has estimated that 98% of system inquiries result in approval of firearms transactions. C.A. App. 112; see also *id.* at 109. As the court of appeals recognized, "Congress, having directed the Attorney General to establish a system for preventing disqualified persons from purchasing firearms, would expect the Attorney General to ensure that the system produces accurate information and guards against misuse." Pet. App. 32a.

Consistent with those limited goals, the Attorney General's regulations provide that the audit log can be used only to "satisfy[] the statutory requirement of ensuring the privacy and security of the NICS and the proper operation of the system." 63 Fed. Reg. at 58,303. See also 66 Fed. Reg. 6470, 6471 (2001) ("The temporarily retained information on approved firearm transfers is used only for purposes related to discovering misuse or avoidance of the system or ensuring the proper operation of the system."). The Attorney General, moreover, is committed to "reducing the retention period to the shortest practicable period of time less than six months that will allow basic security audits of the NICS." 63 Fed. Reg. at 58,304. In January 2001, the Attorney General promulgated an amendment that, absent further modifications, would shorten the retention period to 90 days. 66 Fed. Reg. at 6470, 6474. That change was originally to take effect on March 5, 2001, *id.* at 6471, and is currently scheduled to take effect on July 3, 2001, 66 Fed. Reg. 22,898 (2001).

2. Petitioners contend that the Attorney General's audit log regulations are inconsistent with the text of the Brady Act. Pet. 8-18. That claim lacks merit, and was properly rejected by the court of appeals.

a. Petitioners first assert that the audit log regulations conflict with Section 103(i) of the Brady Act, 107 Stat. 1542. Petitioners' argument proceeds from the premise that Section 103(i)(1), by its terms, prohibits any NICS record of an allowed transfer from being "'Recorded at or Transferred to' a Government Facility." Pet. 9. However, as the court of appeals recognized (Pet. App. 16a), that is not what Section 103(i)(1) says. Section 103(i) does not prohibit the government or its agents from *recording* NICS records at a government facility. It bars the government and its

agents from "*requir[ing]* that any record or portion thereof generated by the system * * * *be recorded* at or transferred to" such a facility. 107 Stat. 1542 (emphasis added). In light of Congress's use of the word "require," the Attorney General could properly understand Section 103(i)(1) as addressing what the Attorney General and other government officials or agencies may require *third parties* to do with records generated by the NICS. See Pet. App. 16a; see also 66 Fed. Reg. at 6473. In other words, the provision prohibits the Attorney General from imposing additional reporting requirements on firearms dealers, requirements that could be used to centralize the records of dealers and establish a federal firearms registry.

Petitioners' proposed construction of Section 103(i)(1), by contrast, effectively excises the word "require" from Section 103(i)(1). If the statute had been designed to bar the government and its agents from retaining certain records, presumably it would have prohibited the government and its agents from "recording" NICS records at or "transferring" them to government facilities; it would not have barred the government and its agents from "*requiring*" that records "*be* recorded at or transferred to" such facilities. It is, of course, inappropriate to adopt a construction of a statute that renders one of its terms superfluous. See *United States* v. *Alaska*, 521 U.S. 1, 59 (1997) ("The Court will avoid an interpretation of a statute that renders some words altogether redundant" (internal quotation marks omitted)); *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955) (court must give effect to

every clause and word of a statute); *Moskal* v. *United States*, 498 U.S. 103, 109-110 (1990) (similar).[2]

Petitioners' construction, moreover, would place Section 103(i)(1) in conflict with other provisions of the Brady Act. As the court of appeals explained (Pet. App. 15a-16a), Section 103(i)(1)'s prohibition extends—without exception—to "any record or portion thereof generated by" the NICS. Consequently, if petitioners' construction were correct, Section 103(i)(1) would bar the government from recording *any* NICS-generated record. Such a prohibition would conflict with the Brady Act's express recognition that the government can record and permanently retain certain NICS-generated records, including records relating to disapproved transactions, 18 U.S.C. 922(t)(2) (1994 & Supp. V 1999), and the transaction number and date of approved transfers, 18 U.S.C. 922(t)(2) (1994 & Supp. V 1999); 107 Stat. 1542. Recognizing that conflict, petitioners argue that the court of appeals should have "harmonize[d]" Section 103(i)(1) with the rest of the statute by, in effect, judicially transplanting exceptions into Section 103(i)(1), notwithstanding the fact that those exceptions do not appear in Section 103(i)(1) itself. Pet. 11. Such judicial surgery to statutory text, however, cannot be justified under the guise of "harmoniz[ing]" otherwise conflicting statutory

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[2] Petitioner contends that the Attorney General's construction of the word "require" was "nothing more than an agency's convenient litigating position." Pet. 12 (citing *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212-213 (1988)). Even if that were true, it is irrelevant; the court of appeals accorded the Attorney General no deference in determining whether or not the statute directly spoke to that issue. See Pet. App. 16a ("[W]e owe no deference to the Attorney General's interpretation of statutory language at this stage of *Chevron* analysis.").

provisions where, as here, an alternative construction eliminates the conflict among the statutory provisions while giving effect to each word and phrase in the statute.[3]

b. Alternatively, petitioners contend (Pet. 13-15) that the Attorney General's audit log regulation violates Section 103(i)(2) of the Brady Act, 107 Stat. 1542. Section 103(i)(2) provides that NICS records may not be used by federal departments, agencies, officers or employees to "establish any system for the registration of firearms, firearm owners, or firearm transactions or dispositions, except with respect to persons, prohibited by section 922(g) or (n) of title 18, United States Code

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[3] To the extent petitioners suggest (Pet. 12) that the court of appeals' decision conflicts with *National Rifle Ass'n* v. *Brady*, 914 F.2d 475, 483-484 (4th Cir. 1990), cert denied, 499 U.S. 959 (1991), that claim is without merit. In that case, the court of appeals upheld certain regulations promulgated by the Bureau of Alcohol, Tobacco and Firearms under the Firearms Owners' Protection Act, Pub. L. No. 99-308, 18 U.S.C. 921 *et seq.*, but rejected two requirements as inconsistent with the statute. One of the statutory provisions at issue there, 18 U.S.C. 923(c), provided for certain recordkeeping requirements, but specifically declared that "no other recordkeeping shall be required." 914 F.2d at 483. In light of that express prohibition and other statutory provisions, the court of appeals invalidated regulatory recordkeeping requirements that, in the court's view, were not contemplated by the statute. *Id.* at 483-484. Here, however, the statute does not expressly preclude the agency from retaining NICS-generated records. To the contrary, as explained above, it specifically contemplates that certain records will be retained. Moreover, as also explained above, the statute by its terms merely bars the government from *requiring others* to retain records. In that respect, the *NRA* case *supports* the court of appeals' construction of the statute: In both this case and that one, Congress was concerned with the information the agency might require *others* to record.

or state law, from receiving a firearm." The Attorney General's audit log, however, is not a registration system. To the contrary, the regulations expressly provide that "[t]he NICS, including the NICS Audit Log, may not be used by any department, agency, officer, or employee of the United States to establish any system for the registration of firearms, firearm owners, or firearm transactions or dispositions." 28 C.F.R. 25.9(b)(2).

The information contained in the audit log, moreover, cannot be readily transformed into a federal firearms registry. As the court of appeals explained (Pet. App. 18a), the audit log "includes no addresses of persons approved to buy firearms, nor any information on specific weapons, nor even whether approved gun purchasers actually completed a transaction." The contents of the audit log are "routinely purged," and never contain information on more than six months of proposed transactions. *Ibid.* Thus, unlike the registry of machine guns established under the National Firearms Act—a comprehensive list of persons entitled to possess machine guns and certain other firearms, see 26 U.S.C. 5841—the audit log "represents only a tiny fraction of the universe of firearm owners." Pet. App. 18a. Finally, unlike the machine gun registry, the audit log may be used only for the purpose of monitoring the use and performance of the NICS itself. 28 C.F.R. 25.9(b)(2).

3. The court of appeals also correctly rejected petitioners' contention (Pet. 18-22) that 18 U.S.C. 922(t)(2) requires the *immediate* destruction of NICS records concerning allowed firearms transfers. See Pet. App. 8a-12a. Section 922(t)(2) does require that NICS records on allowed transfers (except the transaction number and date) be destroyed, but it is silent as to the timing of that destruction; the requirement of

"immediate" destruction that petitioners insist on does not appear in the statute itself. Accordingly, the Attorney General reasonably concluded that the Act permits the destruction of NICS records after a brief period where that brief retention period helps ensure that the NICS system is working properly and being used lawfully. As the court of appeals observed, "Congress, having directed the Attorney General to establish a system for preventing disqualified persons from purchasing firearms, would expect the Attorney General to ensure that the system produces accurate information and guards against misuse." *Id.* at 32a. The audit log regulations—by specifying a retention period that is "the minimum reasonable period for performing audits [of] the system" to ensure accuracy and detect privacy-invading misuse—is consistent with both that expectation and the statutory mandate of records destruction. 63 Fed. Reg. at 58,304.

The validity of the Attorney General's interpretation is underscored by the fact that Congress has repeatedly, both before and after passage of the Brady Act, declined to impose an immediate destruction requirement. See Pet. App. 10a-12a. As the court of appeals observed, Congress's failure to retain the immediate destruction requirement that appeared in the House version of the Brady Act strongly supports the conclusion that Congress's intent "is at least ambiguous." *Id.* at 11a. Congress knew how to mandate immediate destruction—by placing the word "immediately" before "destroy" in statutory text—and the House version of the Brady Act did so. But the statute that Congress actually enacted and that the President signed into law, in compliance with the requirements Article I, Section 7, Clause 2 of the Constitution, did not include that language. Congress, moreover, repeatedly has rejected

efforts to re-insert immediate destruction (or near-immediate destruction) requirements after the Act's passage, including after the Attorney General's promulgation of the audit log regulations. See *id.* at 10a-12a. That too is consistent with the court of appeals' conclusion that there is no "unambiguous congressional intent to require immediate destruction of NICS records." *Id.* at 12a.[4]

Contrary to petitioners' contention (Pet. 20), an interim provision of the Brady Act requiring that records of approved transactions be destroyed within 20 days, 18 U.S.C. 922(s)(6)(B)(i), does not undermine the validity of the Attorney General's audit log regulation. The interim provision governed background checks performed before the establishment of the automated NICS. The audit log was created to protect the security of the new automated system and ensure its proper operation. To the extent the former 20-day deadline is relevant at all, it proves that Congress knew how to

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[4] For that reason, petitioners err in relying (Pet. 24-25) on Section 621 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (OCESAA), Pub. L. No. 105-277, 112 Stat. 2681-116. Section 621 prohibited the use of appropriated funds for "any system to implement 18 U.S.C. 922(t) that does not require and result in the destruction of any identifying information submitted by or on behalf of any person who has been determined not to be prohibited from owning a firearm." OCESAA § 621(2), 112 Stat. 2681-116; see also Act of Dec. 21, 2000, Pub. L. No. 106-553, Appendix B—H.R. 5548, § 618, 114 Stat. 2762A-252. But that provision, like 18 U.S.C. 922(t), does not specify when destruction of the referenced records must take place. See Pet. App. 11a. As the court of appeals noted, Congress considered but did not enact an appropriations rider that "would have conditioned NICS funding on the 'immediate destruction of all information' relating to persons eligible to possess firearms." *Ibid.* (quoting 144 Cong. Rec. S8680 (daily ed. July 21, 1998)).

include express deadlines for records destruction, but did not do so here. Nor did Congress otherwise foreclose the Attorney General from establishing an audit log to ensure that the automated NICS is functioning properly and is not subject to misuse.

4. Finally, petitioners argue (Pet. 26-30) that the court of appeals should not have relied on the traditional two-step analysis of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Instead, petitioners contend, the court of appeals should have relied on this Court's decision in *Food & Drug Administration* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). That argument is without merit. As an initial matter, in *Brown & Williamson*, this Court itself applied the traditional two-step approach of *Chevron*. "Because this case involves an administrative agency's construction of a statute that it administers," the Court explained, "our analysis is governed by *Chevron*." *Id.* at 132. Applying the first step of *Chevron*, the Court determined that Congress in fact had spoken to the question there, which was whether the FDA had authority to regulate tobacco. Carefully canvassing the political history of tobacco, the Court concluded that Congress's actions over the previous 35 years "preclude an interpretation of the" Food, Drug, and Cosmetic Act "that grants the FDA jurisdiction to regulate tobacco products." *Id.* at 155. The Court took careful note that, throughout most of the FDA's history, the FDA had disavowed any authority to regulate tobacco. The Court concluded that Congress, by passing a host of tobacco-specific laws following the FDA's disavowal, and by acting to preclude any agency from exercising regulatory control over tobacco, had "effectively ratified the FDA's

previous position that it lacks jurisdiction to regulate tobacco." *Id.* at 156.

To be sure, the Court in *Brown & Williamson* also observed that its inquiry into whether Congress had spoken directly to the issue was "shaped, at least in some measure, by the nature of the question presented." 529 U.S. at 159. In "extraordinary cases," the Court explained, "there may be reason to hesitate before concluding that Congress has intended" an "implicit delegation" of power to regulate a certain segment of the economy. *Ibid.* In the context of tobacco, the Court explained, the unique political history of the product, the distinct regulatory scheme governing it, Congress's repeated rejections of proposals to allow the FDA to regulate tobacco, and Congress's repeated actions to preclude regulation of tobacco, all provided reason to hesitate:

> Owing to its unique place in American history and society, tobacco has its own unique political history. Congress, for better or for worse, has created a distinct regulatory scheme for tobacco products, squarely rejected proposals to give the FDA jurisdiction over tobacco, and repeatedly acted to preclude any agency from exercising significant policymaking authority in the area. Given this history and the breadth of the authority that the FDA has asserted, we are obliged to defer not to the [FDA's] expansive construction of the statute, but to Congress' consistent judgment to deny the FDA this power.

Id. at 159-160.

Brown & Williamson, as the above description attests, has no application here.[5] This is not an "extraordinary case[]" in which the agency, for the previous 35 years, disavowed power to regulate a particular product under the statutory provisions at issue. It is not a case in which Congress effectively ratified the agency's disavowal; in which Congress repeatedly rejected proposals that would have empowered the agency to regulate; or in which Congress adopted proposals that created a distinct regulatory regime for the product at issue, only to have the agency later change its view. Instead, this is a case in which Congress explicitly delegated to the Attorney General authority to create a national instant criminal background check system, ordered the Attorney General to promulgate regulations to safeguard that system, and *rejected* statutory language that would have precluded or overturned the regulations that petitioners now challenge.[6] Because nothing in the Act bars the

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[5] In addition, it is far from clear that any question concerning the applicability of *Brown & Williamson* is properly presented by this case. Petitioner relies on *Brown & Williamson* for the proposition that *Chevron* deference is inappropriate. On most of the issues petitioners raise, however, the court of appeals accorded the agency no deference. See Pet. App. 16a; note 3, *supra*.

[6] Much of petitioners' efforts to render this case "extraordinary" rest on the false premise that the audit log is a system for gun registration. See Pet. 16-17. As shown above, it is not. See pp. 16-17 *supra*. Petitioners, moreover, blink reality when they assert that, "[g]iven the always visible and sometimes rancourous debate" on firearms issues, the Attorney General's ability to retain an audit log is hardly "a detail that Congress would have implicitly delegated to the agency." Pet. 27-28. Contrary to petitioners' assumption, it is sometimes precisely where Congress cannot itself resolve an issue related to the administration of a new system—whether because of rancor or in-

Attorney General from promulgating the regulations at issue here, the court of appeals did not err in upholding them.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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sufficient facts—that Congress declines to speak to the question and instead delegates to an agency the responsibility of filling the statutory gap in light of its expertise and experience. Whether and to what extent the Attorney General may need to retain a temporary audit log to ensure system integrity is precisely the sort of issue one might expect Congress to leave to the Attorney General for resolution.